NO. 331P21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

COMMUNITY SUCCESS INITIATIVE, et al., Plaintiffs, v. TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY OF SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, et al., Defendants.	From Wake County No. 19 CVS 15941 From Court of Appeals P22-153

****

SUPPLEMENTAL NOTICE IN SUPPORT OF PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs Community Success Initiative, Wash Away Unemployment, Justice Served NC Inc., the North Carolina State Conference of the NAACP, Susan Marion, Henry Harrison, Timothy

Locklear and Shakita Norman (hereinafter "Plaintiffs") respectfully submit this notice to advise this Court of recent developments relevant to the resolution of Plaintiffs' petition for discretionary review, which is fully briefed.

First, on 26 April 2022, a divided panel of the Court of Appeals granted *in part* Legislative Defendants' petition for a writ of supersedeas. Specifically, the Court of Appeals stayed the trial court's Final Judgment and Order only "for the upcoming elections on 17 May 2022 and 26 July 2022." 4/26/22 Order (attached as Ex. A). The Court of Appeals stated that "[t]he status quo established by the North Carolina Supreme Court's 10 September 2021 order in this cause shall remain in effect through these elections." *Id.* However, the Court of Appeals declined to grant any further stay. Instead, after the 26 July 2022 election, "the North Carolina State Board of Elections is ordered to take actions to implement the 'Final Judgment and Order' for subsequent elections," *id.*, including the 8 November 2022 general elections.

Judge Griffin dissented, explaining that he would have granted a full stay pending final resolution of Legislative Defendants' appeal. In his

dissent, Judge Griffin urged the full Court of Appeals "to consider re-hearing this cause en banc." *Id.*

Second, on 27 April 2022, the State Board of Elections sent an email notifying the county election boards of the Court of Appeals' stay of the Final Judgment and Order through the May and July elections. *See* Ex. B. The State Board explained that "[a]fter the July 26, 2022 election, the State Board will update the numerous forms and other documents that will contain the new language about [individuals with felony convictions'] eligibility." *Id.* The State Board also made clear: "For the November 8, 2022 election, [individuals with felony convictions] who are not incarcerated will be eligible to register and vote." *Id.*

Third, on 28 April 2022, Legislative Defendants filed a motion for rehearing *en banc*, asking the full Court of Appeals to grant a full stay of the Final Judgment and Order pending resolution of their appeal. *See* Ex. C. If such a stay were granted, individuals living in the community on supervision from a felony conviction would yet again be prohibited from registering and voting in the November 2022 general elections, under a state law that the trial court found was the product of intentional racial discrimination against African Americans.

Respectfully, these developments further support the need for this Court to grant immediate review and hear this appeal itself in the first instance to ensure that this case is finally resolved in time for the November 2022 elections. The back-and-forth, on-again-off-again stays create confusion and fear among people with felony convictions that risks deterring them from registering and voting even when they are lawfully permitted to do so. The current Court of Appeals partial stay order makes clear that such individuals may lawfully register following the 26 July 2022 election and may lawfully vote in the 8 November 2022 general elections. While Plaintiffs believe that the trial court's Final Judgment and Order should not have been stayed at all, the current partial stay order at least ensures that the racist disenfranchisement scheme will not persist in another general election. And if this Court grants discretionary review, this Court can hear and decide this appeal on the merits before the November 2022 elections.

Respectfully submitted this 29th day of April, 2022.

Electronically submitted

FORWARD JUSTICE

/s/ Daryl Atkinson
Daryl Atkinson (N.C. Bar No. 39030)
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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that a copy of this document has been duly served upon the following counsel of record by email:

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Counsel for State Board Defendants

This the 29th day of April 2022.

/s/ *Daryl Atkinson*
Daryl Atkinson

EXHIBIT A

North Carolina Court of Appeals

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Web:
https://www.nccourts.gov

Eugene H. Soar, Clerk
Court of Appeals Building
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Mailing Address:
P. O. Box 2779
Raleigh, NC 27602

From Wake County
(19CVS15941)

No. P22-153

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC.; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARIUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; and SHAKITA NORMAN,
PLAINTIFFS,

V.

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS Speaker OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS President PRO TEMPORE OF THE NORTH CAROLINA SENATE; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLOINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONSs; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND TOMMY TUCKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,
DEFENDANTS.

O R D E R

The following order was entered:

The petition for writ of supersedeas filed in this cause by defendants Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, and Phillip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, on 1 April 2022 is allowed in part for the purpose of staying the "Final Judgment and Order" entered by a divided three-judge panel of Wake County

Superior Court on 28 March 2022 for the upcoming elections on 17 May 2022 and 26 July 2022. *See Purcell v. Gonzalez*, 549 U.S. 1, 166 L. Ed. 2d 1 (2006) (*per curiam*). The status quo established by the North Carolina Supreme Court's 10 September 2021 order in this cause shall remain in effect through these elections. Thereafter, the North Carolina State Board of Elections is ordered to take actions to implement the "Final Judgment and Order" for subsequent elections.

Panel consisting of Judge ARROWOOD, Judge COLLINS, and Judge GRIFFIN.

GRIFFIN, Judge, dissenting.

I dissent from the majority's decision to stay the Final Judgment and Order only through the upcoming primary elections. The majority seemingly believes that, although there are good legal grounds to issue a writ of supersedeas at this time, those grounds will somehow disappear between this primary election and the upcoming general election. There is no basis in law or fact to justify such a conclusion. I would therefore allow the petition for writ of supersedeas unconditionally, for the purpose of staying the trial court's order and maintaining the status quo pending disposition of this appeal.

"'Supersedeas' is a writ issuing from an *appellate court* to preserve the *status quo* pending the exercise of the appellate court's jurisdiction." *New Bern v. Walker*, 255 N.C. 355, 356, 121 S.E.2d 544, 545–46 (1961) (citation omitted). As the majority's decision acknowledged implicitly, this criteria is satisfied. Felon voter applicants have not been permitted to register to vote in any upcoming elections. Issuing a writ of supersedeas would therefore maintain the status quo until Petitioners' appeal has been decided on the merits.

Moreover, and perhaps most salient here, there is a high risk of irreparable harm to Petitioners and the public interest absent this Court granting Petitioner's request through the completion of the appeal process. "A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (citation omitted). If convicted felons are permitted to vote in the November election and Petitioners subsequently prevail on the merits of their appeal, untold thousands of lawful votes cast by North Carolina citizens likely will be diluted by votes cast by convicted felons in violation of our State Constitution. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Nonetheless, the majority has necessarily contemplated this risk and deemed it unworthy of even a brief analysis in its boiler-plate order.

Finally, Petitioners are exceedingly likely to succeed in overturning the trial court's order on appeal. Plaintiffs contend that the prohibition on voting for felons now serving parole, probation, or post-release supervision violates the Equal Protection Clause and Free Elections Clause of our State Constitution. But these constitutional provisions are not the operative ones for convicted felons seeking to vote. Our State Constitution provides that "[n]o person adjudged guilty of a felony . . . shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law." N.C. Const. art. VI, § 2(3). The framers of our State Constitution, and the people of this State, established in this provision that convicted felons would *not* be treated the same as similarly situated, law-abiding citizens and would *not* be entitled to same right to vote in free elections. Instead, convicted felons would not have the right to vote *unless* their voting rights are restored "in the manner prescribed by law." N.C. Const. art. VI, § 2(3).

N.C. Gen. Stat. § 13-1 provides, *inter alia*, that a convicted felon's voting rights are automatically restored upon the "unconditional discharge" from the criminal sentence—language that, by its plain terms, requires completion of any parole, probation, or post-release supervision that is a part of the felon's criminal sentence. The trial court enjoined section 13-1's restoration provisions, finding that "if a person otherwise eligible to vote is not in jail or prison for a felony conviction, they may lawfully register and vote in North Carolina." In so doing, the superior court stepped outside of the judicial role of reviewing and interpreting a statute expressly authorized by our State Constitution and usurped the role of the General Assembly, rewriting section 13-1 as it saw fit. "It is axiomatic that . . . rewrit[ing] a statute is antithetical to the proper role of a court in our system of government." *Fairfield v. WakeMed*, 261 N.C. App. 569, 575, 821 S.E.2d 277, 281 (2018) (citing *State v. Cobb*, 262 N.C. 262, 266, 136 S.E.2d 674, 677 (1964); *see also Badaracco v. Comm'r*, 464 U.S. 386, 299 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."). Petitioners are therefore likely to succeed on the merits of their appeal.

By granting what effectively is only a temporary stay of the order through the primary elections, the majority risks allowing an unknown number of convicted felons to vote in the general elections. All the while, there is a high likelihood that either our Supreme Court or a panel of this Court will determine in a later proceeding that those votes were unlawfully cast. This Court's order poses an unacceptable risk of diluting lawful votes and compromising the integrity of our election process. There is no reason to believe that any of the factors weighing in favor of a writ of supersedeas will change after the primary elections have ended. Indeed, none of the factors we consider contain any temporal elements that would alter this analysis. The majority is silent as to what, if anything, about the need for the writ changes simply because of the completion of all primary elections. I therefore dissent from the majority's order and encourage my colleagues on this Court to consider re-hearing this cause *en banc* to protect an orderly election, the rule of law, and the appeal process.

By order of the Court this the 26th of April 2022.

WITNESS my hand and the official seal of the North Carolina Court of Appeals, this the 26th day of April 2022.

Eugene H. Soar
Clerk, North Carolina Court of Appeals

Copy to:
Ms. Nicole J. Moss, Attorney at Law, For Anderson, Stella (as Secretary of State Board of Elections) - (By Email)
Mr. Daryl V. Atkinson, Attorney at Law, For Community Success Initiative - (By Email)
Ms. Caitlin Swain, Attorney at Law, For Community Success Initiative - (By Email)
Ms. Whitley J. Carpenter, Attorney at Law, For Community Success Initiative - (By Email)
Ms. Kathleen F. Roblez, Attorney at Law, For Community Success Initiative - (By Email)
Ms. Ashley Mitchell, Attorney at Law, For Community Success Initiative - (By Email)
Mr. Terence Steed, Assistant Attorney General, For The North Carolina State Board of Elections - (By Email)
Ms. Elisabeth S. Theodore, Attorney at Law, Pro Hac Vice, For Community Success Initiative - (By Email)
Mr. Farbod K. Faraji, Attorney at Law, For Community Success Initiative - (By Email)
Ms. Mary Carla Babb, Special Deputy Attorney General, For The North Carolina State Board of Elections - (By Email)
Mr. R. Stanton Jones, Attorney at Law, Pro Hac Vice, For Community Success Initiative - (By Email)
Mr. David Thompson, Attorney at Law, For Berger, Philip E. (Official Capacity as President Pro Tempore), et al - (By Email)
Mr. Peter Patterson, Attorney at Law, For Moore, Timothy K. (Official Capacity as Speaker), et al - (By Email)
Mr. Joseph O. Masterman, Attorney at Law, For Berger, Philip E. (Official Capacity as President Pro Tempore), et al - (By Email)
Mr. William V. Bergstrom, Attorney at Law, For Berger, Philip E. (Official Capacity as President Pro Tempore), et al - (By Email)
Hon. Frank Blair Williams, Clerk of Superior Court

EXHIBIT B

Steed, Terence

From: Love, Katelyn <Katelyn.Love@ncsbe.gov>
Sent: Tuesday, April 26, 2022 4:56 PM
Cc: SBOE_Grp - Legal; Grant, Noah
Subject: UPDATE: Court Order Regarding Felon Voting Rights
Attachments: P22-153.pdf

Directors (bcc State Board members),

Today in *CSI v. Moore*, the NC Court of Appeals ruled that expanded eligibility for felons who are not incarcerated will go into effect after the July 26 election. For the May 17 and July 26 elections, the same eligibility requirement continues as was in place for elections in 2021. This means that felons who are on probation, post-release supervision, or parole are not eligible to register and vote unless they are serving an extended term of probation, post-release supervision, parole, have outstanding monetary obligations, AND are not aware of other reasons for the extension of their period of supervision.

You should no longer hold any registrations of felons. For any new felon registrations that were put on hold since March 29, 2022, you should deny the application and send the voter a denial notice. For existing registrations that were flagged as felons, you should process the removals that were on hold in the I-Queue to initiate the removal of non-incarcerated felons.

The State Board is taking the following steps to implement today's order:

- The State Board will restart the automated removal of existing registrations who were matched for a felony conviction and were sent a notice of their ineligibility. You do not need to take any action because these voters were previously sent a notice that they are ineligible to register.
- The State Board is updating its website to inform the public about the terms of the court order.

The eligibility language on all forms, including ATVs and one-stop applications, and the You Certify poster is correct and may be relied upon in the event any voters have questions about their eligibility. The You Certify poster is available in English and Spanish on Filezilla

After the July 26, 2022 election, the State Board will update the numerous forms and other documents that will contain the new language about felon eligibility. For the November 8, 2022 election, felons who are not incarcerated will be eligible to register and vote. We will send out additional guidance about this change after the July 26, 2022 election.

Litigation in this matter is ongoing, including a further appeal before the Supreme Court of North Carolina. If there are any further developments or orders from the courts, we will update you.

Sincerely,

Katelyn Love | General Counsel
o: 919-814-0756 | f: 919-715-0135

NORTH CAROLINA
STATE BOARD OF ELECTIONS

EXHIBIT C

No. P22-153 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC.; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARIUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; and SHAKITA NORMAN,	)	
Plaintiffs,	)	From Wake County
v.	)	
	)	No. 19 CVS 15941
TIMOTHY K. MOORE, *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILIP E. BERGER, *in his official capacity as President Pro Tempore of the North Carolina Senate*; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, *in his official capacity as Chairman of the North Carolina State Board of Elections*; STELLA ANDERSON, *in her official capacity as Secretary of the North Carolina State Board of Elections*; STACY EGGERS IV, *in his official capacity as member of the North Carolina State Board of Elections*; JEFF CARMON, *in his official capacity as member of the North Carolina State Board of Elections*; and TOMMY TUCKER, *in his official capacity as member of the North Carolina State Board of Elections*,	)	
Defendants.	)	

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MOTION FOR REHEARING EN BANC

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MOTION FOR REHEARING EN BANC

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TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Pursuant to N.C.G.S. § 7A-16 and North Carolina Rule of Appellate Procedure 31.1(d), Defendants Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate ("Legislative Defendants"), respectfully move for this Court to rehear en banc their petition for a writ of supersedeas.

INTRODUCTION

The Superior Court has issued an injunction that is plainly irreconcilable with the North Carolina Constitution. Under Article VI, § 2, anyone convicted of a felony may not vote "unless that person shall be first restored to the rights of citizenship in the manner prescribed by law." The Superior Court held unconstitutional the "manner prescribed by law," found in N.C.G.S. § 13-1, meaning that felons serving sentences outside of prison now have no lawful means of regaining their voting rights and thus remain disenfranchised under Article VI, § 2. Yet, the Superior Court permanently enjoined Defendants to allow such persons to register and vote.

This Court has already recognized the irreparable harm that the permanent injunction would cause the State and its voters if allowed to take effect. With primary elections approaching, this Court temporarily stayed the injunction while it considered Legislative Defendants' petition for a writ of supersedeas. A divided panel of this Court then issued a writ of supersedeas, staying the injunction for primary elections in May and July and reinstating the status quo for felon voting that the North Carolina Supreme Court had previously established.

The panel was certainly correct to do so. The permanent injunction, issued on the eve of statewide primary elections, was a plain violation of the principle that courts should not rewrite election rules on the eve of elections. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam). And if not stayed, the injunction would have been insulated from review with respect to upcoming elections. But the injunction does not threaten only those elections. As Judge Griffin wrote in his dissent from the panel's decision, "[t]here is no basis in law or fact to justify" any conclusion that the "good legal grounds to issue a writ of supersedeas at this time . . . will somehow disappear between this primary election and the upcoming general election" in November. Order at 2, *Cmty. Success Initiative v. Moore*, No. P22-153 (Apr. 26, 2022) ("Panel Order") (Griffin, J., dissenting). Judge Griffin would therefore have issued a writ of supersedeas "unconditionally," reinstating the status quo until the Court can dispose of the appeal, as Legislative Defendants requested. *Id*.

Judge Griffin was correct. Legislative Defendants are likely to succeed on the merits of their appeal from the Superior Court's judgment, which commits several fundamental errors in holding that North Carolina's *re*-enfranchisement statute violates the North Carolina Constitution by *dis*enfranchising felons.[1] And the Superior Court's new injunction would cause irreparable harm to the State and its voters in *any* election. Even if the State Board of Elections had sufficient time to implement that injunction between this year's primary and general elections, the fact remains that the State Board has been enforcing a different set of rules for over a year, rules that

[1] Legislative Defendants have filed a notice of appeal that encompasses both the Superior Court's final judgment and its earlier order granting summary judgment to Plaintiffs on certain claims, the same claims on which the original preliminary injunction was based. However, for purposes of this motion, Legislative Defendants seek to preserve the status quo following the Supreme Court's September 10, 2021 order, which includes the State Board of Elections allowing felons on probation to vote if their only reason for being on probation is outstanding fines, fees, or restitution. So, while Legislative Defendants are appealing the summary judgment ruling that resulted in that practice, they will focus on their likelihood of success on the merits in appealing from the final judgment in this motion.

the North Carolina Supreme Court ordered the Board to keep in place back in September and that this Court has ordered the Board to keep in place through July. Implementing new rules in the space of a few months would necessarily "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. Not only that, but as Judge Griffin correctly observed, "[i]f convicted felons are permitted to vote in the November election and Petitioners subsequently prevail on the merits of their appeal," as they likely will, "untold thousands of lawful votes cast by North Carolina citizens likely will be diluted by votes cast by convicted felons in violation of our State Constitution." Panel Order at 2 (Griffin, J., dissenting). The panel's partial writ of supersedeas, issued without any reasoning to support the departure from the normal practice of granting supersedeas for the entire pendency of an appeal, fails to protect the State and its voters from these harms.

Accordingly, Legislative Defendants respectfully request that this Court rehear en banc their petition for a writ of supersedeas and issue the writ requested in that petition, staying the Superior Court's order of March 28, 2022 and maintaining the status quo established by the Supreme Court's order of September 10, 2021 until this Court can resolve the appeal that has been noticed from the Superior Court's final judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. North Carolina's Provisions for Felon Disenfranchisement and Re-Enfranchisement.

The North Carolina Constitution provides that:

> No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

N.C. CONST. art. VI, § 2, pt. 3. "[E]xcluding those who commit serious crimes from voting" is a "common practice," and the U.S. Supreme Court has held that the federal "Equal Protection Clause permits States to disenfranchise all felons for life, even after they have completed their sentences." *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1025, 1029 (11th Cir. 2020) (en banc); *see Richardson v. Ramirez*, 418 U.S. 25, 56 (1974). Indeed, the Court has specifically held that North Carolina's disenfranchisement provision does not violate equal protection. *See Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), *summarily aff'd* 411 U.S. 961 (1973).

North Carolina does not disenfranchise all felons for life. The statute at issue here, N.C.G.S. § 13-1, "automatically restore[s]" voting rights to convicted felons "upon the occurrence of any one of" several conditions, including "[t]he unconditional discharge of . . . a probationer[ ] or of a parolee by the agency of the State having jurisdiction of that person" (or by the United States or another state as the case may be). § 13-1(1), (4)–(5). Although North Carolina long provided for re-enfranchisement in more limited circumstances, the current version of § 13-1 dates back to the early 1970s. The North Carolina Supreme Court has already spoken to the intent of those laws: "It is obvious that the 1971 General Assembly . . . intended to substantially relax the requirements necessary for a convicted felon to have his citizenship restored," and "[t]hese requirements were further relaxed in 1973," when the current version of § 13-1 was passed. *State v. Currie*, 284 N.C. 562, 565, 202 S.E.2d 153, 155 (1974).

II. Section 13-1 Embodies the Efforts of African American Reformers To Liberalize North Carolina's Re-Enfranchisement Laws.

North Carolina has disenfranchised some felons at least since 1835. Expert Report of Orville Vernon Burton at 10 (May 8, 2020), Ex. 3.[2] Restoration for these felons was onerous and

[2] Unless otherwise indicated, all exhibit citations refer to the exhibits attached to Legislative Defs.' Pet. for Writ of Supersedeas and Mot. for Temporary Stay, *Cmty. Success Initiative v. Moore*, No. P22-153 (Apr. 1, 2022).

involved securing private legislation restoring an individual to his rights. *Id.* at 11. By 1840 (and possibly before), North Carolina disenfranchised individuals who had committed "infamous" crimes, which were defined, at least in part, to include crimes for which whipping was a suitable punishment. *Id.* at 11, 15. An "infamous" criminal in 1840 had a standardized, but still quite difficult, path to re-enfranchisement which required waiting at least four years after conviction, petitioning a court for restoration, and presenting five witnesses who would attest to his character based on at least three years of acquaintance. 1840 N.C. Laws, ch. 36, Ex. 4. The system could be gamed: In 1866, in anticipation of an expansion of the franchise to African Americans, North Carolina courts began a practice of sentencing them to whipping as a way of pre-emptively disenfranchising them. Ex. 3 at 19–20.

In 1868, North Carolina put in place a new state constitution that briefly did not restrict the rights of felons to vote—however that was changed by amendment in 1876 when the constitution was amended to disenfranchise felons until their rights were restored as prescribed by law. No change was made to the re-enfranchisement statute at that time; the 1840 statute remained in place unchanged. In 1899, that law was amended to provide a path to restoration for certain felons who were never sentenced to prison. *See, e.g.*, 1899 N.C. Laws, ch. 44., Ex. 5. The law was updated many times over the next century to make the process of re-enfranchisement less burdensome, but in 1970 the law still required a waiting period before a felon could get his rights back and required him to petition a court and convince a judge he was deserving of re-enfranchisement. N.C.G.S. § 13-1 *et seq.* (1969), Ex. 6.

In 1971, the effort to enact a much more straightforward version of § 13-1 was spearheaded by the only two black members of the General Assembly—Reps. Joy Johnson and Henry Frye—who were supported in their reform efforts by the NAACP. Tr. of Dep. of Sen. Henry M. Michaux,

Jr., 55:12–23 (June 24, 2020), Ex. 7. The original version of the bill introduced in the House, H.B. 285, stated: "Restoration of Citizenship – Any person convicted of an infamous crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored to him upon the full completion of his sentence or upon receiving an unconditional pardon." Gen. Assembly, 1971 Sess., House DRH3041, HB 285, Ex. 8. The law, as enacted, was amended to remove "automatically" from the text and add in "including any period of probation or parole" after "full completion of his sentence. Gen. Assembly, 1971 Sess., HB 285, Committee Substitute, Ex. 9. In lieu of automatic restoration, the enacted 1971 law required a felon to secure a recommendation of restoration from the State Department of Correction and to take an oath of allegiance to have his rights restored immediately. Otherwise, he had to wait for two years after his sentence had been served to receive the right to vote. *Id.*

In 1973, Reps. Johnson and Frye, now joined by a third black legislator, Sen. Henry Michaux, tried again and this time achieved their aim of enacting a bill that granted automatic and immediate restoration of rights to all felons as soon as they completed their sentences. Ex. 7 at 74:21–75:2. Senator Michaux called the result a "victory," Aff. of Henry M. Michaux, Jr. ¶ 16 (May 7, 2020), Ex. 10, and noted that the only two things the law didn't accomplish and that he wished it did were to exclude *extended* supervision (where a probationer's or parolee's term is extended because he violated one the conditions of his release or committed a new felony) and to return a felon's Second Amendment rights alongside his voting rights, Ex. 7 at 83:13–84:11; 103:7–12.

III. The Superior Court Enjoins Enforcement of § 13-1.

Plaintiffs are four organizations and six convicted felons who either are or were on probation or post-release supervision. They brought this lawsuit in November 2019 to challenge

§ 13-1 and its application to "probationer[s]" and "parolee[s]"—more specifically, to convicted felons serving terms of "post-release supervision" under N.C.G.S. § 15A-1368 *et seq.* or "probation" under N.C.G.S. § 15A-1341 *et seq*.[3] On September 4, 2020, the Superior Court granted summary judgment for Plaintiffs on their claims that § 13-1 creates a wealth-based classification in violation of the Equal Protection Clause, N.C. CONST. art. I, § 19, and imposes a property qualification on voting in violation of N.C. CONST. art. I, § 11. The same day, the Superior Court issued a preliminary injunction that required the Defendants to allow to register to vote any person convicted of a felony whose "only remaining barrier to an 'unconditional discharge,' other than regular conditions of probation . . . is the payment of a monetary amount" or who "has been discharged from probation, but owed a monetary amount upon the termination of their probation or if any monetary amount owed upon discharge from probations was reduced to a civil lien." Order on Inj. Relief at 10–11, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Sept. 4, 2020), Ex. 11.

For nearly a year, the State Board Defendants implemented this injunction pursuant to its plain terms, instructing voters that they were eligible to vote if they were serving extended terms of probation and knew no reason why their terms had been extended other than for non-compliance with their monetary obligations. During trial in August 2021, however, the court made an oral ruling that all parties had misinterpreted the preliminary injunction, which the court had "intended" to cover any "individuals who are subject to post-release supervision, parole, or probation solely by virtue of continuing to owe monetary obligations." Order on Am. Prelim. Inj. at 7, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Aug. 27, 2021) ("Expanded PI Order"), Ex. 12. The expanded preliminary injunction, which was reduced to writing on August 27, 2021, stated "it is necessary

[3] North Carolina eliminated parole with the Structured Sentencing Act, 1993 N.C. Laws ch. 538. For any convicted felons who might still be subject to parole, the relevant conditions are similar to those of probation and post-release supervision. *See* N.C.G.S. §§ 15A-1372, -1374.

for equity and administrability of the intent of the September 4, 2020 preliminary injunction to amend that injunction to include a broader class of individuals," expanding the scope to restore voting rights to tens of thousands of convicted felons who remained on probation or post-release supervision for reasons other than monetary obligations. Expanded PI Order, Ex. 12 at 10.

The Superior Court denied Legislative Defendants' motion for a stay pending appeal of the expanded preliminary injunction, *see* Order, No. 19 CVS 15941 (Wake Cnty. Super. Ct. Aug. 27, 2021), Ex. 13, but this Court granted a writ of supersedeas, staying the order, *see* Order, No. P21-340 (N.C. Ct. App. Sept. 3, 2021), Ex. 14. The Supreme Court agreed and ordered that the status quo under the original injunction be maintained, with the caveat that any felons who registered to vote during the brief period when the expanded injunction was in effect should remain registered voters. Order, No. 331P21-1 (N.C. Sup. Ct. Sept. 10, 2021), Ex. 15. Thus, until the Superior Court recently issued its new permanent injunction, the status quo—which was in place for last fall's municipal elections—was that a felon who had not registered to vote while the expanded preliminary injunction was in effect, and who was still under some form of supervision, could register only if the felon was "serving an extended term of probation, post-release supervision, or parole" with "outstanding fines, fees, or restitution" and did "not know of another reason that [his] probation, post-release supervision, or parole was extended." *See Who Can Register*, N.C. STATE BD. OF ELECTIONS (as last visited Apr. 28, 2022), https://bit.ly/3IQAlTY, Ex. 16.

On March 28, 2022, seven months after the conclusion of trial, and the very same day that absentee ballots were made available for the statewide primary, the Superior Court entered judgment in favor of Plaintiffs, concluding that § 13-1 violates the Equal Protection Clause, Article I, § 19, and the Free Elections Clause, Article I, § 10, of the North Carolina Constitution on the ground that it disenfranchises felons, particularly African American felons. Final Judgment and

Order at 62, No. 19 CVS 15941 (Wake Cnty. Super. Ct. March 28, 2022) ("Final Order"), Ex. 17. The new injunction has the same scope as the expanded preliminary injunction did. The Final Order states:

> 1. N.C.G.S. § 13-1's denial of the franchise to persons on felony probation, parole, or post-release supervision violates the North Carolina Constitution's Equal Protection Clause and Free Elections Clause.
>
> 2. Defendants . . . are hereby enjoined from preventing any person convicted of a felony from registering to vote or voting due to probation, parole, or post-release supervision.
>
> 3. For the avoidance of doubt, under this injunction, if a person otherwise eligible to vote is not in jail or prison for a felony conviction, they may lawfully register and vote in North Carolina.

Ex. 17 at 64–65.

Early voting for North Carolina's statewide primaries begins on April 28. *Calendar of Events*, N.C. STATE BD. OF ELECTIONS, https://bit.ly/35l15y4 (last visited Apr. 28, 2022). After the Superior Court issued its order, the State Board did not start registering felon voters who would not have been eligible to vote under the prior rules. Rather, the State Board instructed the county boards of elections that, "in light of (1) an imminent appeal of the decision; and (2) an apparently conflicting order from the North Carolina Supreme Court last year in the same case," county officials should allow individuals on probation or parole to file applications for registration but should hold their applications until the State Board knew how to apply the law properly. Mar. 29 email from K. Love to multiple recipients, Ex. 19.

IV. This Court Issues a Partial Writ of Supersedeas.

Legislative Defendants noticed an appeal and moved for a stay in the Superior Court, which denied the stay request in a split decision with Judge Dunlow dissenting. *See* Not. of Appeal (Wake Cnty. Super. Ct. Mar. 30, 2022), Ex. 1; Emergency Mot. for Stay Pending Appeal (Wake Cnty. Super. Ct. Mar. 30, 2022), Ex. 2; Order (Wake Cnty. Super. Ct. Apr. 1, 2022), Ex. 25. Legislative

Defendants petitioned this Court for a writ of supersedeas and moved for a temporary stay that same day. The Court temporarily stayed the injunction on April 5, ordering the State Board to continue to hold felon voters' registration applications until further order. *See* Order at 2, *Cmty. Success Initiative v. Moore*, No. P22-153 (Apr. 5, 2022). On April 26, a divided panel issued a partial writ of supersedeas, staying the permanent injunction "for the upcoming elections on 17 May 2022 and 26 July 2022" and implementing "[t]he status quo established by the North Carolina Supreme Court's 10 September 2021 order" for those elections, but ordering the State Board "to take actions to implement the [permanent injunction] for subsequent elections." Panel Order at 2. The panel offered no explanation why the reasons for issuing a writ of supersedeas as to upcoming elections do not also support issuing a normal writ of supersedeas and staying the judgment below until the appeal from that judgment is resolved.

Judge Griffin dissented. As he explained, the panel's ruling "acknowledged implicitly" that the "criteria" for a normal writ of supersedeas are "satisfied." Panel Order at 2 (Griffin, J., dissenting). Since "[f]elon voter applicants have not been permitted to register to vote in any upcoming elections," a writ of supersedeas would simply "maintain the status quo." *Id*. On the other hand, allowing the permanent injunction to take effect runs "a high risk of irreparable harm to [Legislative Defendants] and the public interest." *Id*. The State "indisputably has a compelling interest in preserving the integrity of its election process." *Id*. (quoting *Purcell*, 549 U.S. at 4). As for the public interest, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id*. (cleaned up). If Legislative Defendants succeed in this appeal, then valid votes—potentially tens of thousands of them—will have been unlawfully diluted by any votes that ineligible felon voters cast in any intervening election. And Legislative Defendants "are

exceedingly likely to succeed." *Id*. As Judge Griffin explained, Plaintiffs' claim that felon disenfranchisement violates the Equal Protection and Free Elections Clauses of the North Carolina Constitution cannot succeed where

> [t]he framers of our State Constitution, and the people of this State, established in [the Constitution's felon-disenfranchisement] provision that convicted felons would *not* be treated the same as similarly situated, law-abiding citizens and would *not* be entitled to same right to vote in free elections. Instead, convicted felons would not have the right to vote *unless* their voting rights are restored "in the manner prescribed by law."

Id. (quoting N.C. CONST. art. VI, § 2, pt. 3). By enjoining enforcement of § 13-1, the "manner" of felon re-enfranchisement that the General Assembly has "prescribed," and ordering the State Board to enroll all voter applicants serving felony sentences outside of prison, the Superior Court "stepped outside of the judicial role of reviewing and interpreting a statute expressly authorized by our State Constitution and usurped the role of the General Assembly, rewriting section 13-1 as it saw fit." *Id*.

None of this will change after the July primary election. "Indeed," Judge Griffin pointed out, "none of the factors we consider contain any temporal elements that would alter this analysis." *Id*. at 3. Legislative Defendants will remain likely to succeed on the merits, as they needed to show to obtain any form of supersedeas relief in the first place. And the Superior Court's injunction will remain a cause of unlawful vote dilution and probable voter confusion. The panel's partial writ of supersedeas itself thus "poses an unacceptable risk of diluting lawful votes and compromising the integrity of our election process." *Id*.

REASONS THE COURT SHOULD REHEAR THE PETITION EN BANC

This Court should order en banc rehearing because this case "involves a question of exceptional importance that must be concisely stated," N.C. R. APP. P. 31.1(a)(2): whether Legislative Defendants have demonstrated that they are entitled to supersedeas in this matter that

goes to the heart of the integrity of North Carolina's elections because they are likely to succeed on the merits of their appeal, irreparable injury will occur if the Superior Court's injunction is not stayed, and the balance of the equities favors preserving the status quo during the appeal, *see Abbott v. Town of Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820, 827 (1981); *see also Craver v. Craver*, 298 N.C. 231, 238, 258 S.E.2d 357, 362 (1979) (Supersedeas serves "to preserve the status quo pending the exercise of appellate jurisdiction.").[4] In this case, all three factors supported preserving the status quo seven months ago when this Court first granted supersedeas in this case, and they support it now under similar circumstances, as the panel's partial grant of relief implicitly acknowledges. The exceptional importance of this case is illustrated by the irreparable injury that will occur if supersedeas is not granted—potentially tens of thousands of felons who are not properly eligible to vote under the North Carolina Constitution may register to vote and vote in the upcoming general election, diluting the votes of all North Carolinians, if not prevented from doing so by this Court acting en banc.

I. Defendants Are Likely to Succeed on the Merits of Their Appeal.

The Superior Court's judgment rests on several clear errors of fact and law. Indeed, the Superior Court did not even address Legislative Defendants' arguments that Plaintiffs lacked standing, which was necessary to the court's subject-matter jurisdiction. Permanent injunctions are reviewed for an abuse of discretion, *see Mid-Am. Apartments, L.P. v. Block at Church St. Owners Ass'n, Inc.*, 257 N.C. App. 83, 89, 809 S.E.2d 22, 27 (2017), and "a trial court by definition abuses its discretion when it makes an error of law." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37,

[4] This motion is proper under Rule 31.1(d) and this Court has authority to rehear matters relating to a petition for writ of supersedeas. *See* Order, *N.C. League of Conservation Voters, Inc. v. Hall*, No. P21-525 (N.C. Ct. App. Dec. 6, 2021) (granting en banc rehearing of order for temporary stay pending petition for writ of supersedeas, vacating order granting stay, and denying stay). To the extent that any variation of the rules is required to rehear this matter en banc, the Court should do so under N.C. R. APP. P. 2.

39 (2013) (cleaned up). Legislative Defendants will show in this appeal that the Superior Court's injunction is an abuse of discretion founded on multiple errors of law.

a. The Plaintiffs Lack Standing to Challenge § 13-1 and the Superior Court Lacked Power To Rewrite the Law

The law that Plaintiffs challenged, and that the Superior Court has now permanently enjoined, does not disenfranchise individuals convicted of felonies in North Carolina. The North Carolina Constitution does. Article 6, Section 2 of the North Carolina Constitution says in part:

> No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

Section 13-1, which Plaintiffs challenge here, is that "manner prescribed by law." This leads to fatal problems for Plaintiffs' case.

Plaintiffs lack standing to challenge Section 13-1. "As a general matter, the North Carolina Constitution confers standing on those who suffer harm." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008). But more specifically, that harm must be traceable to the statute the plaintiff has challenged. "The rationale of the standing rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 557, 809 S.E.2d 558, 561 (2018) (citation and alteration omitted); *see also Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) ("Only those persons may call into the question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights."). Here, Plaintiffs have not been injured by the statute they challenge. Rather, they have sued to invalidate as discriminatory (and have now invalidated) the very avenue by which they may *regain* their right to vote. Although the trial court found that, for example, "§ 13-1 interferes with the fundamental right to vote on equal terms as it prohibits people with felony convictions

from regaining the right to vote even while they are living in communities in North Carolina," Ex. 17 at 57, that is not at all the functioning of § 13-1, but rather the work of the North Carolina Constitution. Plaintiffs have picked the wrong target with their lawsuit—a statute that has never "injuriously affected" them—and as a result they lack standing to bring this suit.

Lacking a "direct injury" attributable to the statute they have chosen to challenge, *Comm. to Elect Dan Forest v. Emp's Pol. Action Comm.*, 376 N.C. 558, 608 (2021), Plaintiffs likewise lack standing because their injury cannot be "redressed by a favorable decision" within the power of the Superior Court, *Marriott v. Chatham Cnty.*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007) (standing requires "that the [alleged] injury will be redressed by a favorable decision"); *see also Breedlove v. Warren*, 249 N.C. App. 472, 478, 790 S.E.2d 893, 897 (2016). Ordinarily, when a court finds a statute unconstitutional, a declaration of its unconstitutionality (sometimes accompanied by injunction prohibiting its enforcement) "is the most assured and effective remedy available." *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) (cleaned up). Not so here—a declaratory judgment that § 13-1 is unconstitutional actually *hurts* the people Plaintiffs seek to represent. That declaration would close off the sole avenue by which a felon may regain his rights but leave in place the constitutional provision that strips it away in the first place. Furthermore, it would have no impact on the criminal prohibition on felons voting "without having been restored to the right of citizenship in due course and by the method provided by law," N.C.G.S. § 163-275(5), except to ensure that the population capable of violating that statute grows continuously in the absence of a "method provided by law" to re-enfranchise them. Indeed, such a declaration would (as the Superior Court's does) *invite* lawbreaking by felons who mistakenly believe that a court declaring § 13-1 unconstitutional has any impact on the validity of § 163-

275(5), which it did not consider, or that an injunction against the State Board Defendants somehow applies against local law enforcement officials, who were not a party to the case.

To summarize: the result of the court's order is that all felons serving sentences outside of prison remain disenfranchised under the North Carolina Constitution, since the court has enjoined the "manner prescribed by law" for felon re-enfranchisement. N.C. CONST. art. VI, § 2, pt. 3. Thus, the effect of the order can only be to induce violations of § 163-275(5) and to subject violators to prosecution.

Of course, that is not what the Superior Court *attempted* to do in issuing the injunction. The panel stated: "[U]nder this injunction, if a person otherwise eligible to vote is not in jail or prison for a felony conviction, they may lawfully register and vote in North Carolina." Ex. 17 at 65. Evidently, the Superior Court viewed itself as removing *any* North Carolina law, be it statute or constitution, before the court or not, standing in the way of felons on supervised release who might seek to vote. This it could not do. North Carolina reserves for the legislature, not the courts, the authority to create new laws. "When a court, in effect, constitutes itself a superlegislative body, and attempts to rewrite the law according to its predilections and notions of enlightened legislation, it destroys the separation of powers and thereby upsets the delicate system of checks and balances which has heretofore formed the keystone of our constitutional government." *State v. Cobb*, 262 N.C. 262, 266, 136 S.E.2d 674, 677 (1964); *see also C Invs. 2, LLC v. Auger*, 277 N.C. App. 420, 430, 860 S.E.2d 295, 302 (2021) ("The role of the courts is to interpret statutes as they are written. We do not rewrite statutes to ensure they achieve what we, or the parties in a lawsuit, imagine are the legislature's policy goals."); *Davis v. Craven Cnty. ABC Bd.*, 259 N.C. App. 45, 48, 814 S.E.2d 602, 605 (2018) ("This court is an error-correcting body, not a policy-making or law-making one." (quotation marks omitted)).

The Superior Court's violation of the separation of powers is patent here. As explained, the State Constitution provides that felons may only be re-enfranchised in the "manner prescribed by law." By attempting to take upon itself the power to prescribe the manner for felon re-enfranchisement after declaring unconstitutional the General Assembly's prescription, the Superior Court improperly exercised the lawmaking authority constitutionally reserved for the General Assembly.

The Superior Court thus had no authority to rewrite § 13-1 to restore voting rights upon "release from prison" rather than "unconditional discharge" from a criminal sentence. And the court certainly had no authority to invalidate the Constitution's disenfranchisement provision as applied to felons serving sentences outside of prison, which the court's injunction effectively does, where Plaintiffs *have not challenged that constitutional provision* in this litigation. Furthermore, it is not possible for one provision of the North Carolina Constitution to invalidate another. By exceeding its authority when crafting the injunction, the trial court necessarily abused its discretion. *See South Carolina v. United States*, 907 F.3d 742, 753 (4th Cir. 2018).

In defending the Superior Court's decision, Plaintiffs have advanced the argument that Section 13-1 is "implementing legislation" for the provision of the North Carolina Constitution that disenfranchises felons and that the Constitution does not accomplish the disenfranchisement alone, so Section 13-1 is the proper target of their challenge. In order to determine whether language is "self-executing" or requires "implementing legislation," Courts focus on the text itself. *See Medellín v. Texas*, 552 U.S. 491, 505 (2008) (asking whether text "operates of itself without the aid of any legislative provision" (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829), *overruled on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833))). Here, the text of the Constitution—"[n]o person adjudged guilty of a felony . . . shall be permitted to vote."

N.C. CONST. art. VI, § 2, pt. 3—operates without the aid of any legislative enactment. Contrast this provision with the voter ID amendment, for example, which expressly calls for implementing legislation and thus demonstrates that the legislature and the voters know how to require implementing legislation when they want to. *See* N.C. CONST. art. VI, § 2, pt. 4.

It is only the final portion of the disenfranchisement provision—allowing reinstatement "to the rights of citizenship *in the manner prescribed by law,*" *id.* (emphasis added)—that calls for implementing legislation, *see ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 387 (4th Cir. 2012) ("It is well-established that a treaty may contain both self-executing and non-self-executing provisions." (cleaned up)). The text of Section 13-1 reinforces this reading because it says nothing about removing the right to vote from felons. In fact, its opening sentence—"Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions . . ."—takes as a given that revocation of voting rights has already occurred by operation of the Constitution and only addresses "the manner prescribed by law" for *restoring* those rights. N.C.G.S. § 13-1.

The trial court entered an injunction that purports to rewrite North Carolina law because Plaintiffs challenged a law that never caused them any injury. Whether considered as a lack of standing for the Plaintiffs or authority for the trial court, the result is the same: the injunction cannot stand and Defendants must prevail on appeal.

b. Section 13-1 Does Not Violate the Equal Protection Clause or the Free Elections Clause

Wholly apart from Plaintiffs' lack of standing to challenge § 13-1 and the separation of powers concerns raised by the Superior Court's injunction, Legislative Defendants are likely to succeed on the merits of their appeal.

i. The Superior Court Erred by Applying Strict Scrutiny

The Superior Court erred in applying strict scrutiny to § 13-1 when analyzing Plaintiffs' Equal Protection challenge. Strict scrutiny is only appropriate where a government classification "impermissibly interferes with the exercise of a fundamental right" or "operates to the peculiar disadvantage of a suspect class." *Liebes v. Guilford Cnty. Dep't of Pub. Health*, 213 N.C. App. 426, 428, 713 S.E.2d 546, 549 (2011) (citation omitted). Otherwise, rational-basis review applies. *Id.* Section 13-1 neither interferes with any fundamental right nor disadvantages any suspect class.

As to the first point, the Superior Court held that § 13-1 interferes with "[a] fundamental right to vote." Final Order at 57. But convicted felons do not have such a right. Under the North Carolina Constitution, a felon is barred from voting "unless that person shall be first restored to the rights of citizenship in the manner prescribed by law." N.C. CONST. art. VI, § 2, pt. 3. Under that provision, felons for whom the General Assembly provides no path to re-enfranchisement are disenfranchised for life. And when the General Assembly does provide a path to re-enfranchisement, the right to vote is restored only when the conditions for restoration have been met. Similarly, the United States Constitution follows its own Equal Protection Clause immediately with "an affirmative sanction" of "the exclusion of felons from the vote." *Richardson*, 418 U.S. 24, 54 (1974); *see also* U.S. CONST. amend. 14, § 2. As a result, federal courts of appeals have uniformly concluded felons do not have a fundamental right to vote. *See, e.g.*, *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.).

In holding otherwise, the Superior Court did not confront these authorities, but merely asserted that felons who are not currently in prison are "similarly situated" to "North Carolina residents who have not been convicted of a felony" because they "feel an interest in [the State's] welfare." Ex. 17 at 57 (quoting *Roberts v. Cannon*, 20 N.C. 398, 4 Dev. & Bat. (Orig. Ed.) 256,

260–61 (1839)). That felons and non-felons alike may have an interest in how they are governed does not make them similarly situated for these purposes when both the North Carolina and United States constitutions expressly treat them differently. *See State v. Grady*, 372 N.C. 509, 567, 831 S.E.2d 542, 582 (2019) ("[F]elons do not enjoy the same measure of constitutional protections . . . as do citizens who have not been convicted of a felony.").

The Superior Court also noted that the Equal Protection Clause protects "the fundamental right of each North Carolinian to substantially equal voting power." *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (2002). But Plaintiffs *have* no claim under that principle. Convicted felons are not constitutionally entitled to any vote until their voting rights are restored in the manner that the General Assembly provides. And *Stephenson* itself recognizes that constitutional provisions—such as the felon-disenfranchisement provision and the Equal Protection Clause—must be read "in conjunction." *Id*. at 378, 562 S.E.2d at 394. This principle thus provides no basis for strict scrutiny, either.

It appears that the Superior Court applied strict scrutiny primarily because it had incorrectly found a violation of a fundamental right, *see* Ex. 17 at 58 ("Thus, if a statute interferes with the exercise of a fundamental right, strict scrutiny applies even if the affected group is not a suspect class."), though the court also appears to have done so because it incorrectly found that § 13-1 disadvantages a suspect class, *see id*. ("N.C.G.S. § 13-1 both interferes with the exercise of the fundamental right of voting and operates to disadvantage a suspect class. Therefore, it is subject to strict scrutiny."). To the extent it applied strict scrutiny on the latter basis, that was another error. This Court has applied a distinct framework to claims of allegedly discriminatory burdens on the right to vote: not the tiers of scrutiny, but the burden-shifting framework that the U.S. Supreme Court established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,

429 U.S. 252 (1977). *See Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 & n.5 (2020); *see also Libertarian Party of N.C. v. State*, 365 N.C. 41, 42, 707 S.E.2d 199, 200–01 (2011) ("adopt[ing] the United States Supreme Court's analysis for determining the constitutionality of ballot access provisions").

Under that framework, the plaintiff has the initial burden to show that discriminatory intent was a motivating factor in the passage of the law at issue with either direct evidence of racial animus—of which Plaintiffs have none here—or circumstantial evidence drawn from the law's purported impact, legislative process and legislative history, and historical background. *See Arlington Heights*, 429 U.S. at 266–268. That evidence must support "an inference [of discriminatory intent] that is strong enough to overcome the presumption of legislative good faith" that attaches to all legislative acts. *Abbott v. Perez*, 138 S. Ct. 2305, 2329 (2018); *see also Holmes*, 270 N.C. App. at 19, 840 S.E.2d at 256 n.7 (noting "our Supreme Court's strong presumption that acts of the General Assembly are constitutional" (cleaned up)). If Plaintiffs had made this showing (which they did not), the burden would have shifted to Defendants to show that the General Assembly would have enacted § 13-1 even without the allegedly discriminatory motivation. If Defendants had not made that showing (which they did), then § 13-1 would be unconstitutional and the inquiry would be over.

The Superior Court itself purported to follow this framework. *See* Ex. 17 at 5–6. Although the Superior Court's conclusions under that framework were incorrect, they gave the court no basis to apply strict scrutiny. In any event, strict scrutiny is also inappropriate because § 13-1 does not operate to disadvantage a suspect class of people. On its face, § 13-1 makes no distinction between felons based on race, sex, or any other suspect or quasi-suspect class. The *only* distinction it draws is between felons who have completed their sentences and felons who have not—and that

"reasonable distinction" does not offend equal protection. *See State v. Stafford*, 274 N.C. 519, 535, 164 S.E.2d 371, 382–83 (1968). Section 13-1 thus draws no arbitrary lines. And as shown below, Plaintiffs have not proven it has a discriminatory effect.

The Superior Court also erred in applying strict scrutiny to Plaintiffs' claim under the Free Elections Clause. *See* Ex. 17 at 60. That clause provides simply that "[a]ll elections shall be free," N.C. CONST. art. I, § 10, and requires that voters be free to choose how they cast their ballots without coercion, intimidation, or undue influence. Again, § 13-1 does not deprive anyone of the right to vote—a felony conviction and the North Carolina Constitution do that. And "a constitution cannot be in violation of itself." *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 394. It therefore cannot be, as the Superior Court held, that North Carolina's elections are not free within the meaning of its constitution merely because some people are *constitutionally* precluded from participating in them. *See* Ex. 17 at 59. Moreover, § 13-1 not only does not deprive anyone of the right to vote, it *extends* the right to vote to felons who otherwise would be disenfranchised. Thus, "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable," because the distinction being challenged is only "a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise." *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966).

Without any basis to apply strict scrutiny, the Superior Court should have applied rational-basis review to Plaintiffs' Free Elections claim and should have analyzed their Equal Protection claim only under the *Arlington Heights* framework or, at most, applied rational-basis review to that claim as well. Section 13-1 easily survives rational-basis review. That standard merely requires that a statute "bear *some* rational relationship to a conceivable legitimate government interest." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (emphasis in

original). Section 13-1 fulfills a valid government interest in offering felons a method by which to regain their rights, and in fact significantly streamlines the process from previous versions of the law. *See Currie*, 284 N.C. at 565, 202 S.E.2d at 155. In doing so, it reasonably draws a line between the rights of felons who have paid their debt to society and those who have not. These are sensible policy choices that the General Assembly was well within its authority to make, *see Jones v. Gov. of Fla.*, 975 F.3d 1016, 1029–30 (11th Cir. 2020) (en banc), and which are solely within the province of the General Assembly, not the courts, to change. *See Davis*, 259 N.C. App. at 48, 814 S.E.2d at 605.

For the reasons that follow, Plaintiffs also failed to establish any violation of the Equal Protection Clause under *Arlington Heights* or any violation of the Free Elections Clause.

ii. The Evidence Does Not Establish Discriminatory Intent

As an initial matter, the Superior Court failed to start its analysis with the presumption that the General Assembly enacted § 13-1 in good faith, as the court was required to do. *See Abbott*, 138 S. Ct. at 2324. In fact, the words "good faith" appear nowhere in the court's opinion. As a result, the court failed to make any factual findings under the correct standard. "[F]acts found under misapprehension of the law are not binding . . . and will be set aside," and legal conclusions based on those facts are necessarily erroneous as well. *Van Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949). In any event, legal conclusions are reviewed *de novo*. *See In re C.H.M.*, 371 N.C. 22, 28–29, 812 S.E.2d 804, 809 (2018). And the Superior Court committed legal error by concluding that § 13-1 was passed with discriminatory intent based on any of the facts before it.

1. Impact

When assessing the impact of the statute, it is important to remember, again, just what Plaintiffs challenged. They have not challenged the whole of North Carolina's felon

disenfranchisement regime, nor have they challenged any state action that might result in African Americans disproportionately being charged with and convicted of felonies, or anything else that might contribute to a difference in the rates of disenfranchisement between black and white North Carolinians. They have only challenged North Carolina's restoration law, and fatally, Plaintiffs did not even attempt to show that as a practical matter Section 13-1 re-enfranchises felons of different races at a different rate or is worse for minority felons than the prior version of Section 13-1. An intentional discrimination claim requires proof of *both* disparate impact and discriminatory intent, *see Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989), and Plaintiffs have wholly failed to make the former showing.

Nevertheless, the Superior Court stated, without explanation that § 13-1 "has a demonstrably disproportionate and discriminatory impact." Ex. 17 at 57. Though unexplained, this statement must be the result of two errors: first the Superior Court necessarily conflated § 13-1 with other elements of North Carolina's felon disenfranchisement regime which cause the loss of voting rights. Second, it credited testimony from Plaintiffs' experts who testified, for example, that "The African American population is . . . denied the franchise at a rate 2.76 times as high as the rate of the White population." Ex. 17 at 26. But the U.S. Supreme Court has cautioned that exactly this sort of reasoning, dividing one percentage by another can create "[a] distorted picture," *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2345 (2021), and indeed it does here. In fact, 1.24% of African Americans of voting age in North Carolina are disenfranchised by reason of a felony conviction, which is just 0.81% greater than the 0.45% of the white electorate that is similarly disenfranchised. Ex. 17 at 26. Comparing these ratios is misleading because, although it is true that African American voters are disenfranchised 2.76 times more than white voters, that

statement "mask[s] the fact that the populations [are] effectively identical." *Brnovich*, 141 S. Ct. at 2345.

In any event, regardless of how expressed, the relative percentages of African Americans and whites who are disenfranchised by reason of a felony conviction is irrelevant to the claims Plaintiffs actually made in this case. Again, Plaintiffs are not (and could not be, in this state constitutional challenge) challenging the provision of the North Carolina Constitution disenfranchising felons. Instead, they are challenging the re-enfranchisement law. Plaintiffs have not even attempted to make a legally relevant showing of disparate impact.

Therefore, no reliable evidence shows that § 13-1 disenfranchises African Americans at a significantly greater rate than members of another race—which, again, § 13-1 could not do because it does not disenfranchise anyone.

2. Legislative Process and Legislative History

The Superior Court erred again when it concluded that § 13-1, which in its current form was championed by the NAACP and the only three black members of the General Assembly in 1973, was motivated by racially discriminatory intent. Ex. 17 at 56. As noted, the court failed to presume that the legislature operated in good faith. *See Abbott*, 138 S. Ct. at 2324. In fact, in crediting circumstantial evidence of the popularity of the "Law and Order" movement, the court appeared to presume exactly the opposite. *See, e.g.*, Ex. 17 at 22.

The court also misread legislative history, which in fact demonstrates that the 1971 and 1973 changes to the law accomplished the primary goals of the reforming legislators by "substantially relax[ing] the requirements necessary for a convicted felon to have his citizenship restored." *Currie*, 284 N.C. 562 at 565, 202 S.E.2d at 155. Based on the text of the bills they introduced and the statutes they helped pass, it was not, as the court incorrectly concluded, "the

goal of these African American legislators and the NC NAACP . . . to eliminate section 13-1's denial of the franchise to persons released from incarceration," Ex. 17 at 19, but to make the process automatic *upon completion of a felon's sentence*, PX175 at 78:10–14, Ex. 7.[5] And even assuming, contrary to the evidence, that the Superior Court was right about the intent of the sponsors of the bill, that would not mean that a committee was "independently motivated by racism" when it added language to clarify that full completion of a sentence included periods of probation or parole. Ex. 17 at 56. The Superior Court's reliance on highly attenuated circumstantial evidence of racism, *see, e.g.*, *id*. at 22 ("The Ku Klux Klan was active, arch-segregationist George Wallace won North Carolina's presidential primary in 1972, and Jesse Helms was elected to the U.S. Senate."), is incompatible with the presumption of good faith, *Abbott*, 138 S. Ct. at 2329.

3. Historical Background

The Superior Court relied on atmospherics so heavily because the historical record, when limited, as it should be, to the enactment of the challenged law itself, demonstrates definitively that the enactment of the act served as an intervening event that severed North Carolina's felon re-enfranchisement process from any past discrimination. *See Abbott*, 138 S. Ct. at 2324–25. "No one disputes that North Carolina 'has a long history of race discrimination generally and race-based vote suppression in particular.' " *N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d 15, 25 (M.D. N.C. 2019) (quoting *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016)). But the Superior Court's own finding that the 1973 law was championed by the NAACP and the only three black members of the General Assembly strongly undercuts any

[5] The Superior Court also erred in classifying its analysis of the intentions of the 1971 and 1973 sponsors of bills in revising § 13-1, as reflected by the text of the proposed bills, as findings of fact. Because these "findings" go directly to the court's conclusions about how § 13-1 ought to be interpreted and applied, they are more properly classified as conclusions of law. *See In re David A. Simpson, P.C.*, 211 N.C. App. 483, 487–88, 711 S.E.2d 165, 169 (2011).

argument that § 13-1 itself was the product of that history. Indeed, as Legislative Defendants explained to the trial court, Plaintiffs' expert on this subject "did not present any evidence that this version of 13-1 was crafted, amended, or authored by any particular legislator . . . with any racial animus." 8/19/21 Tr. 844:11–14 (excerpts attached as Exhibit A to Leg. Defs.' Reply in Supp. of Pet. for Writ of Supersedeas). Indeed, *no* North Carolina felon voting restoration law has been marred by racial animus because the first restoration law was enacted in 1840, before African Americans could vote, and "no revision to the 1840 statute . . . contain[s] any indication . . . that the changes were made with any racial animus." *Id.* at 845:22–846:3. The point bears emphasis: when the North Carolina constitution was amended to reinstate felon disenfranchisement in 1876, no change was made to the existing re-enfranchisement statute that had been in place since 1840. That statute was not amended until 1899, and it was amended in a way favorable to felons. Every amendment to the statute since then has also favored felons. Plaintiffs are thus bereft of evidence that *any* iteration of the re-enfranchisement statute was the product of racial animus.

In finding otherwise, the Superior Court improperly imputed to people in 1973 the motivations of the individuals who amended North Carolina's constitution in the 1870s to disenfranchise felons in the first place. *See* Ex. 17 at 21 ("It was well understood and plainly known in the 1970s that the historical and original motivation for denial of the franchise to persons on community supervision in the post-reconstruction era had been to attack and curb the political rights of African Americans. . . . Rep. Ramsey provided no explanation for the Committee's decision to nonetheless preserve the existing law's disenfranchisement of people after their release from any incarceration.").

Reference back to the 1860s is particularly inappropriate because, shortly before the new § 13-1 was enacted, North Carolina replaced its Constitution of 1868 with a new constitution,

known as the 1971 Constitution. *See Stephenson*, 355 N.C. at 367, 562 S.E.2d at 387. The 1971 Constitution, which is still in place today, independently required the disenfranchisement of all felons and the Superior Court erred in imputing any past discriminatory intent to the disenfranchisement required by the 1971 Constitution. The re-adoption of the disenfranchisement provision by the 1971 Constitution was an intervening event that severed the link with any discriminatory intent reflected in the 1868 Constitution.

What is more, it was error to impute any discriminatory intent to the General Assembly based on North Carolina's disenfranchisement of felons. As we have emphasized repeatedly, that disenfranchisement is caused by the State Constitution. That disenfranchisement, therefore, must be taken as the baseline against which § 13-1 is measured. Only racial discrimination *independent from* the constitutional baseline could impugn § 13-1. *Cf. Arlington Heights*, 429 U.S. 252, 264–65 (1977). Given the history of § 13-1 as a reform bill championed by civil rights leaders, had it properly framed its analysis, the Superior Court would have reached a different result.

The Eleventh Circuit rejected a strikingly similar argument in *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc). In that case, the court rejected the plaintiffs' argument that "racial animus motivated the adoption of Florida's [felon] disenfranchisement law in 1868 and this animus remains legally operative today despite the re-enactment in 1968," noting that the "re-enactment eliminated any taint from the allegedly discriminatory 1868 provision, particularly in light of the passage of time and the fact that, at the time of the 1968 enactment, no one had ever alleged that the 1868 provision was motivated by racial animus." *Id.* at 1223–24. Here, if anything, the case for finding a break with the past is even stronger than in *Johnson*. For here we not only have the re-enactment of a constitutional disenfranchisement provision but that

re-enactment is paired with an NAACP-backed amendment to the re-enfranchisement law with the explicit goal of broadening the restoration of citizenship rights compared to the old regime.

This evidence is strong enough that, even if the burden shifted to Defendants, it would demonstrate that § 13-1 was supported by valid motivations. One need not search for hints of secret racism to explain why an amendment clarifying that no felon could vote until he had completed all elements of his sentence was passed by the General Assembly. Not only is such a line easily administrable by the State and easily understood by the felons it impacts, but it also affirmatively advances the State's "interest in *restoring* felons to the electorate after justice has been done and they have been fully rehabilitated by the criminal justice system." *Jones*, 975 F.3d at 1034. The record clearly establishes that § 13-1, which was championed by the only African American legislators serving at the time, would have been enacted even absent any allegedly discriminatory motives.

For these reasons, Legislative Defendants are likely to succeed in any number of ways in showing that the Superior Court erred in holding § 13-1 violated the Equal Protection Clause.

iii. The Evidence Does Not Establish Any Violation of the Free Elections Clause

For three reasons, it was impossible for Plaintiffs to prove that § 13-1 violates the Free Elections Clause of the North Carolina Constitution.

First, felons whose voting rights have not been restored in the manner prescribed by law are not part of the voting public that the Free Elections Clause protects. This follows from the North Carolina Constitution itself. One provision (the Free Elections Clause) states that "[e]lections shall be free." N.C. CONST. art. I, § 10. Another (the felon-disenfranchisement provision) states that "[n]o person adjudged guilty of a felony . . . shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law."

N.C. CONST. art. VI, § 2, pt. 3. Because "a constitution cannot be in violation of itself," *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 394, it follows that a convicted felon has no right to vote—and thus no claim under the Free Elections Clause—until his rights are restored in the manner that the General Assembly prescribes. And because the Constitution's felon-disenfranchisement provision does not require the General Assembly to pass any law restoring felons' voting rights, it follows that the General Assembly cannot have violated the Free Elections Clause by passing one.

Second, the Free Elections Clause must be construed according to the re-enfranchisement baseline against which it was adopted. *Cf. Brnovich*, 141 S. Ct. at 2338–39 (interpreting Section 2 of the Voting Rights Act, as amended in 1982, according to the "standard practice" of voting regulation at that time, "a circumstance that must be taken into account"). The citizens of North Carolina voted in 1970 to ratify the operative Free Elections Clause. At that time, as the evidence clearly shows, the State's re-enfranchisement regime was much more restrictive than it is today. *See* Ex. 6. Felons were not automatically re-enfranchised upon completing their sentences as they are today. Instead, they needed to wait three years, petition for restoration, and subject themselves to judicial discretion (and the situation was even worse when the Clause was first ratified in 1868, under the original 1840 re-enfranchisement law, the strictest of them all). *See* Ex. 4. With the passage of the current version of § 13-1 in 1973, therefore, the State's re-enfranchisement regime is now more lenient than it ever was before. If the Free Elections Clause was ratified while a more restrictive regime was in place—and if the people of North Carolina were satisfied that, even with that regime, the State's elections would be "free," N.C. CONST. art. I, § 10—it cannot be the case that a less restrictive re-enfranchisement regime violates this Clause.

And third, Plaintiffs failed to offer any evidence that § 13-1 constrains any voter's choice about whom to vote for. Instead, they attempt to locate such a constraint in the fact that

disenfranchised felons cannot vote at all until their voting rights are restored. This is not the sort of constraint on a voter's "conscience" that violates the Free Elections Clause. *Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964); *accord Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 610, 853 S.E.2d 698, 735 (2021). And in any event, felons' disenfranchisement does not result from § 13-1. It results from the North Carolina Constitution. Plaintiffs therefore *could* have no evidence that § 13-1 interferes with a voter's choice. Without § 13-1, the disenfranchisement remains. Indeed, no felon would be re-enfranchised.

For these reasons, Legislative Defendants are also likely to succeed in showing that the Superior Court erred in holding that § 13-1 violates the Free Elections Clause.

II. Defendants and Voters Face Irreparable Harm Absent a Full Stay of the Superior Court's Injunction.

As Judge Griffin correctly observed in his dissent, the irreparable harms to the State and public that justify issuing a writ of supersedeas will persist after the primary elections. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up). The State will suffer this injury as soon as the current partial writ of supersedeas allows the Superior Court's permanent injunction to take effect.

The State's voters will suffer, too. Assuming the Court is unable to resolve the important issues on appeal in the months remaining before the general election—as is likely, since the appeal has not even been perfected yet—then under the current partial writ of supersedeas the permanent injunction will be in effect for that election (and any later elections that occur before the appeal is resolved). Thus, all eligible voters stand to have their votes diluted by felons who remain ineligible to vote under the North Carolina Constitution now that the Superior Court has enjoined enforcement of "the manner prescribed by law" for felon re-enfranchisement. N.C. CONST. art. VI,

§ 2, pt. 3. Indeed, the Superior Court found that its own injunction could swing the results of dozens of elections where the margin of victory was considerably less than the 56,000-plus people who it has suddenly enjoined Defendants to include on the voter rolls. *See* Final Order at 38–39.

Also facing irreparable injury: the very people whom the Superior Court intended to benefit. Any felons who register and vote under the Superior Court's injunction will remain ineligible to vote under the North Carolina Constitution, a status that the injunction does not change. Accordingly, they risk subjecting themselves to criminal prosecution under N.C.G.S. § 163-275(5), which Plaintiffs do not challenge—and thus the Superior Court could not enjoin—and which makes it "unlawful . . . [f]or any person convicted of a crime which excludes the person from the right of suffrage, to vote at any primary or election without having been restored to the right of citizenship in due course and by the method provided by law."

To be sure, the partial writ of supersedeas has headed off the chaos that would have ensued if the State Board had been forced to implement the permanent injunction weeks before the primary elections. If the permanent injunction takes effect after those elections, the State Board will have comparatively more time to implement it before the general election. But the attendant risks to election integrity and voter participation by no means disappear. Implementation will be no easy task. As the State Board has explained, implementation requires cooperation from "the 100 county boards of elections' staff," and has "many moving parts that may not be obvious to the external observer," including changes to the Board's software (which can take a week or more to make and are difficult to reverse), distributing new voter-registration forms, and updates to other agencies' data systems. State Bd. Defs.' Resp. to Emergency Mot. for Stay Pending Appeal at 7–8 (Wake Cnty. Super. Ct. Apr. 1, 2022), Ex. 22.

Even assuming that the State Board is able to bear the burden of finishing this complex process within the still-compressed timeframe between the primary and general elections, the new rules will still be a sudden change from the rules that the State Board has been administering since the Superior Court's initial preliminary injunction over a year ago, a period that includes the 2020 presidential election. After the Superior Court tried to change those rules with the expanded preliminary injunction, this Court and then the Supreme Court ordered the State Board to keep administering them for the 2021 municipal elections. After the Superior Court again ordered the State Board to administer different rules through a permanent injunction, this Court again ordered the State Board to keep administering its existing rules for the upcoming primaries. Those are the rules that the State Board is publicizing and with which voters are complying. If a "conflicting order" is in place when voters return to vote in the general election, as the partial writ of supersedeas currently requires, then the writ itself risks "result[ing] in voter confusion and consequent incentive to remain away from the polls," including on the part of voters who might choose to forgo casting an unlawfully diluted vote. *Purcell*, 549 U.S. at 4.

In short, nothing material has changed since this Court issued a normal writ of supersedeas to stay the Superior Court's expanded preliminary injunction until that appeal was resolved. Although that injunction has been mooted by the Superior Court's permanent injunction, both injunctions had the same scope and effect. Like the expanded preliminary injunction, the permanent injunction deprives the State of its "compelling interest in preserving the integrity of its election process," which it necessarily cannot preserve if it must count votes from voters who are ineligible to vote under the North Carolina Constitution. *Purcell*, 549 U.S. at 4. "[O]nce the election occurs, there can be no do-over and no redress." *Holmes v. Moore*, 270 N.C. App. at 35, 840 S.E.2d at 266 (internal quotation marks omitted). Like the expanded preliminary injunction,

the permanent injunction must be stayed until the appeal of that injunction can be resolved, including during any elections that might occur in that time.

CONCLUSION

Wherefore, Legislative Defendants respectfully pray that this Court grant rehearing en banc and issue its writ of supersedeas to the Superior Court of Wake County to stay the above-specified order pending issuance of the mandate of this Court following its review and determination of the appeal, and that Legislative Defendants have such other relief as the Court might deem proper.

Respectfully submitted this 28th day of April, 2022.

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I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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